

**United States Department of Labor
Employees' Compensation Appeals Board**

D.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL, Employer**

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**Docket No. 16-1369
Issued: March 20, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2016 appellant, through counsel, filed a timely appeal from a June 1, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish more than one percent permanent impairment of the right upper extremity and one percent impairment of the left upper extremity, for which he previously received a schedule award.

FACTUAL HISTORY

Appellant, then a 65-year-old letter carrier, injured his back on February 21, 2012 when the vehicle he was driving was struck by another vehicle. On March 1, 2012 he filed a traumatic

¹ 5 U.S.C. § 8101 *et seq.*

injury claim (Form CA-1), which OWCP accepted for back (lumbar) strain and neck strain. OWCP later expanded the claim to include the condition of temporary aggravation of degeneration of lumbar or lumbosacral disc.

On May 3, 2012 appellant underwent a magnetic resonance imaging (MRI) scan, the results of which showed stenotic changes and evidence of disc protrusion at the L4-5 level.

Appellant underwent a functional capacity examination on May 13, 2014 which was administered by Dr. John E. Carey, Board-certified in anesthesiology and pain medicine.

In an August 18, 2014 report, Dr. Carey rated appellant as having 16 percent whole person permanent impairment. He advised that appellant had experienced chronic bilateral leg and back pain since 2012. Dr. Carey reported that he also experienced substantial degenerative disc disease and spondylosis, in addition to disc herniations causing spinal stenosis at C4-5 and C5-6, with a disc bulge at C6-7 as well. He calculated 16 percent impairment to the body as a whole based on a combination of nine percent cervical impairment and seven percent lumbar impairment. Dr. Carey attributed 49 percent of the impairment to preexisting conditions and 51 percent to a permanent aggravation of his medical conditions caused by the February 21, 2012 work injury.

On September 15, 2014 appellant filed a claim for a schedule award (Form CA-7) based on a partial loss of use of his right and left upper extremities.

In an October 29, 2014 report, an OWCP medical adviser found that the medical evidence appellant submitted did not provide a basis for a ratable impairment under FECA.

By decision dated December 11, 2014, OWCP denied appellant's claim for a schedule award, finding that he did not meet his burden of proof to establish that he sustained permanent impairment causally related to his accepted neck strain, back strain and temporary aggravation of degeneration of lumbar or lumbosacral disc conditions.

On December 15, 2014 appellant requested a review of the written record by a hearing representative of OWCP's Branch of Hearings and Review.

By decision dated July 6, 2015, an OWCP hearing representative set aside OWCP's December 11, 2014 decision, finding that it failed to consider Dr. Carey's August 18, 2014 report. He found that appellant submitted an impairment evaluation from a qualified physician, based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),² who found that he had reached maximum medical improvement (MMI) and sustained permanent impairment as a result of the accepted work conditions. The hearing representative therefore directed that the case be remanded to an OWCP medical adviser for an impairment evaluation and opinion as to whether the medical evidence of record was sufficient to demonstrate appellant's entitlement to a schedule award.

² A.M.A., *Guides* (6th ed. 2009).

In a September 18, 2015 report, Dr. James W. Dyer, an OWCP medical adviser, reviewed Dr. Carey's August 18, 2014 report. He recommended that OWCP obtain a second opinion report and an updated electromyogram (EMG)/nerve conduction velocity (NCV) study of the upper and lower extremities to get an accurate assessment of the current clinical findings for impairment.

In an October 29, 2015 report, Dr. Bruce A. Hartwig, Board-certified in internal medicine, indicated that appellant underwent EMG/NCV testing on October 29, 2015. The test results showed evidence of chronic cervical radiculopathy at the C5-6 level.

In order to determine whether appellant had sustained any ratable permanent impairment from his accepted conditions, OWCP referred appellant to Dr. George C. Hochreiter, an osteopath, for a second opinion examination. In a report dated November 18, 2015, Dr. Hochreiter, relying on Table 15-14 at page 425 of the A.M.A., *Guides* (Sensory and Motor Severity), found that appellant had sensory impairment at the C6 level in the right and left upper extremities. He noted that the October 29, 2015 EMG/NCV study showed evidence of chronic cervical radiculopathy at the C5-6 level; he reported that on examination appellant showed evidence of mild, bilateral sensory changes. Utilizing Proposed Table 1 of the July/August 2009 *The Guides Newsletter*, Dr. Hochreiter found that appellant had a class 1 Class of Diagnosis (CDX) based on impairment for mild sensory deficits in the C6 distribution, a grade modifier for Functional History (GMFH) of 2 for pain during normal activities according to Table 15-7,³ and a grade 1 modifier for Clinical Studies (GMCS) for motor delay confirmed by EMG testing according to Table 15-9.⁴ Applying the net adjustment formula of (GMFH-CDX) + (GMCS-CDX), or (2-1) + (1-1) resulted in a net modifier of +1, raising the default CDX from C to D, equaling one percent permanent impairment of the left and right upper extremities.

With regard to the lower extremities, Dr. Hochreiter found no ratable impairment. He noted appellant's complaints of low back pain with leg pain and weakness and noted that the results of the May 3, 2012 MRI scan showed stenotic changes at the L4-5 level, with evidence of disc protrusion at that level. The October 29, 2015 EMG/NCV test results showed polyneuropathy of the lower extremities. Dr. Hochreiter opined, however, that appellant did not have any hard neurological findings. He advised that the October 29, 2015 EMG/NCV tests indicated polyneuropathy, which did not constitute a ratable finding, and that the L5 disc protrusion shown by the May 3, 2012 MRI scan yielded a class zero impairment.

In a January 12, 2016 report, Dr. Arnold T. Berman, Board-certified in orthopedic surgery and an OWCP medical adviser, concurred with Dr. Hochreiter's findings and conclusions including his assessment of one percent bilateral upper extremity permanent impairment. He found that appellant reached MMI on November 28, 2015.⁵

³ Table 15-7, page 406 of the sixth edition of the A.M.A., *Guides* is titled "Functional History Adjustment: Upper Extremities."

⁴ Table 15-9, page 410 of the sixth edition of the A.M.A., *Guides* is titled "Clinical Studies Adjustment: Upper Extremities."

⁵ The MMI date appears to be a typographical error, as the date of the second opinion examination was November 18, 2015.

By decision dated January 26, 2016, OWCP granted appellant a schedule award for one percent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity.

By letter dated February 2, 2016, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated June 1, 2016, an OWCP hearing representative affirmed the January 26, 2016 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. However, it does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).⁹ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination, and clinical studies.¹⁰ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹¹ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹² The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities.

⁶ 5 U.S.C. § 8107

⁷ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ A.M.A., *Guides* 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement" (6th ed. 2009).

¹⁰ *Id.* at 494-531 (6th ed. 2009).

¹¹ *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹² *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that July/August 2009 *The Guides Newsletter* is to be applied.¹³

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹⁴

ANALYSIS

OWCP accepted that appellant sustained the conditions of lumbar strain, neck strain, and temporary aggravation of degeneration of lumbar or lumbosacral disc. On September 15, 2014 appellant filed a claim for a schedule award for impairment of the extremities originating in the spine. He provided a report from Dr. Carey, Board-certified in anesthesiology and pain medicine, who rated appellant as having 16 percent whole person impairment under the A.M.A., *Guides*. However, under the A.M.A., *Guides*, impairment of an extremity caused by spinal nerve injury is rated according to Proposed Table 1 of the July/August 2009 *The Guides Newsletter*.

OWCP obtained a second opinion from Dr. Hochreiter, a Board-certified physiatrist. Dr. Hochreiter provided a November 18, 2015 report utilizing Proposed Table 1 of the July/August 2009, *The Guides Newsletter*, and rated one percent bilateral impairment of the upper extremities based on sensory impairment at the C6 level in the right and left upper extremities. He noted that the October 29, 2015 EMG/NCV study showed evidence of chronic cervical radiculopathy at the C5-6 level; he reported that on examination appellant showed evidence of mild, bilateral sensory changes. Utilizing Proposed Table 1 of the July/August 2009 *The Guides Newsletter*, Dr. Hochreiter found that appellant had a class 1 impairment for mild motor deficits in the C6 distribution. He applied the net adjustment formula at page 411 of the A.M.A., *Guides*, which raised the default CDX from C to D and yielded one percent permanent impairment of the left and right upper extremities.

With regard to the lower extremities, Dr. Hochreiter found no basis for a ratable permanent impairment. He provided detailed clinical findings and explained how those objective elements warranted the percentages assessed. An OWCP medical adviser concurred with Dr. Hochreiter's rating and methodology. OWCP then issued the January 26, 2016 schedule award for one percent permanent impairment of the left and right upper extremities.

The Board finds that OWCP properly accorded Dr. Hochreiter's impairment rating the weight of the medical evidence. His opinion was based on a statement of accepted facts and the complete medical record. He provided a detailed impairment rating, utilizing the appropriate portions of the A.M.A., *Guides* and *The Guides Newsletter*. Dr. Hochreiter described how

¹³ *Supra* note 8 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁴ *Id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

objective clinical and electrodiagnostic findings warranted the specified percentage of impairment. In contrast, appellant's physician, Dr. Carey based his impairment rating on an incorrect methodology. There is no probative medical evidence of record demonstrating that appellant sustained more than one percent permanent impairment of his left and right upper extremities due to the accepted conditions. Thus, the Board finds that appellant has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than one percent permanent impairment of the right upper extremity and one percent impairment of the left upper extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2016 is affirmed.

Issued: March 20, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board